APPENDIX A.

Summary of Trial Testimony Presented by Petitioners.

The petitioner, Diane Monaco, entered the Horton Memorial Hospital on July 15, 1974, at 3:30 a.m. The infant plaintiff, Frankie Monaco, was ultimately delivered by cesarean section at 1:44 p.m. on the same date. Dr. Ira Rubenstein, Dr. Fred Levinson, and Dr. Fred Feiner were the obstetricians who participated in the prenatal care and the delivery. Defendant Rohatgi administered DPT vaccinations to the infant plaintiff on September 14, October 14, and November 14, 1974. After the third DPT vaccination, the infant developed seizures and encephalopathy, and became blind. He was later treated for these problems by Dr. Arnold Gold at Columbia Presbyterian Medical Center.

Petitioners alleged, and the testimony showed, that the infant became blind and suffered seizures in part as a result of a contraindicated third injection of DPT vaccine. The injection was contraindicated because of the presence of a prolonged high fever after each of the first two injections, and because of the presence of colic and an inward deviation of one eye after the second injection. The infant also sustained brain damage because the defendant obstetricians performed a contraindicated amniotomy and unduly delayed the performance of a cesarean section in light of the presence of cephalopelvic disproportion, failure of the infant to progress down the birth canal, the presence of meconium fluid, and dramatic changes in the fetal heart beat rate. This caused hypoxia which contributed to the brain damage.

Dr. Ira Rubenstein, an obstetrician-gynecologist since 1973 (R. 97, 98), first saw the petitioner Diane Monaco at the hospital when she entered at about 3:30 a.m. on July

15 (R. 105). He saw Mrs. Monaco again at 5:00 a.m., and at 6:30 a.m. (R. 110, 111), when he performed an amniotomy, i. e., a rupture of her membranes. He left the hospital at 8:00 a.m. (R. 161). He could not tell if Mrs. Monaco was in active labor (R. 106), although Dr. Feiner, who delivered the infant, reported that Mrs. Monaco was admitted to the hospital in active labor (R. 106, 119, 120). Dr. Rubinstein admitted that Mrs. Monaco entered the hospital with an unfavorable cervix (R. 121, 123); that it was "extremely important" to monitor such a patient at regular intervals (R. 126); that the fetal heart rate had to be recorded every fifteen minutes for patients in active labor (R. 127, 139, 140), but that the fetal heart rate in this case was not recorded every fifteen minutes and that there were gaps of up to one hour (R. 130, 132).

Dr. Rubenstein testified that meconium fluid (green-tinged fluid) was recorded in the hospital record at 7:00 a.m. and again at 11:00 a.m. He also pointed out that the fetal heart rate was 160 at 6:30 a.m., when the amniotomy was performed, and thereafter dropped to 124 at 7:00 a.m. (R. 167, 168).

Dr. Levinson, an obstetrician-gynecologist associated with Dr. Rubenstein and Dr. Feiner, testified that he also saw Mrs. Monaco during the morning of July 15th. At the trial, he testified that he first attended Mrs. Monaco at 8:00 a.m., although at his examination before trial on February 2, 1977, he testified that he first saw Mrs. Monaco at 9:50 or 10:00 a.m. (R. 294, 295), and left the hospital when Mrs. Monaco went in for surgery at about 1:00 p.m. (R. 303). Regardless of what time he actually arrived, he testified that he was responsible for Mrs. Monaco's care starting at 8:00 a.m. (R. 298).

Dr. Levinson knew that meconium staining was noted in the hospital record at 10:00 a.m. and at 11:00 a.m. (R. 310, 311). He conceded that the infant's fetal heart had to

be monitored at least every fifteen minutes (R. 318). He testified that there was a failure of the infant to progress down the birth canal from 3:30 a.m. to 10:00 a.m. (R. 331, 332), and that cephalopelvic disproportion existed since 6:30 a.m. (R. 340).

Mrs. Dembeck, a nurse, testified in a deposition that was read, that she was on duty from 7:00 a.m. to 3:00 p.m. on July 15, and that when the fetal heart rate was taken, it was immediately recorded in the hospital record (R. 490, 491).

Dr. Feiner, another obstetrician-gynecologist, testified that he delivered the infant plaintiff by Cesarean section at about 1:44 p.m., and that the Cesarean was performed because of cephalopelvic disproportion (CPD) and failure to progress in either cervical dilatation or descent of the fetal vertex (head) (R. 500, 502).

Dr. Feiner admitted that progress is an important guide in making a diagnosis of CPD, and that it is dangerous to allow the patient to labor when CPD exists. He stated that action must be taken within two or three hours of the time when the diagnosis is made, to prevent brain damage due to cerebral bleeding (R. 505-509).

Dr. Rohatgi is a pediatrician who graduated from medical school in India and became licensed in 1971 (R. 640). He testified that the infant was born with bluish fingernails and toenails, and was given oxygen (R. 642, 643). Dr. Rohatgi attended the infant at the Cesarean and until the infant's discharge from the hospital on July 21, 1974 (R. 644).

Dr. Rohatgi first examined the infant at his office on August 2, 1974, when he did a complete physical examination, including an examination of the infant's eyes (R. 644, 664, 665). He again did a complete physical examination, and found a healthy baby with no apparent congenital defects (R. 663, 654). Dr. Rohatgi next saw the

baby on October 14, 1974, when he again diagnosed a healthy baby after performing a complete physical examination, and administered the second full-dose DPT vaccine (R. 668, 670).

Dr. Rohatgi next saw the infant on November 14, when Mrs. Monaco told him that the infant was crying excessively and continuously for three or four hours in the evening hours after feeding (R. 670, 674). He diagnosed this condition as colic (R. 670, 672) and prescribed Pamine drops (R. 675). Dr. Rohatgi admitted that it was important to know how many colic attacks the baby had, but that he did not bother to elicit this information (R. 674).

Dr. Rohatgi testified that colic is a condition in which the baby has abdominal pains, rolls up his thighs or legs over his abdomen, and cries continuously even though the mother tries to pacify the infant. The legs also become stiff (R. 676). He made no record as to how many colic attacks the infant had, or how long they existed (R. 693). He did not record the infant's temperature on August 2, September 14, October 14, or November 14, even though he recorded it on December 2 when it was found to be normal (R. 696, 699). He made no record of the medications he prescribed, the amount prescribed, or the length of time that the medications were to be taken (R. 700).

He admitted, however, that on September 14, he told Mrs. Monaco to give the infant aspirin for fever (R. 703). He also admitted that DPT can cause serious side effects, including convulsions and encephalitis (inflammation of the brain) (R. 708, 710, 711), but that he told Mrs. Monaco only that the baby may have fever or may be cranky, and may not sleep well the night the injection was given, but that the baby should be all right after that (R. 725).

Dr. Rohatgi diagnosed blindness on February 6, 1975, and felt the blindness was due to a "degenerative

disorder" of the central nervous system (R. 736). He said that the diagnosis of a post-pertussis encephalitis is made clinically by the presence of convulsions (which the infant had) and stupor or coma (R. 773); that there were tests available to rule out this diagnosis, but that he never performed those tests (R. 774).

At his examination before trial, Dr. Rohatgi testified that DPT is contraindicated when the infant has a febrile reaction, a fever, or is sick (R. 777). He later changed his answer to read "any febrile reaction to injections or any febrile illness. If the infant has a fever or is sick" (R. 778). He explained that "fever" meant a temperature of 100 degrees Fahrenheit; that an infant with colic was sick (R. 682).

The infant's mother, Diane Monaco, testified that she saw Rohatgi on August 2, 1974, and told him that the infant cried a lot (R. 933, 934). She next saw Dr. Rohatgi on September 14, when Dr. Rohatgi prescribed Pamine drops (R. 937), because the infant continued to cry excessively (R. 935).

Dr. Rohatgi never told Mrs. Monaco about the risks and hazards of the DPT vaccine (R. 942, 943).

After the first DPT vaccination, Mrs. Monaco felt that the baby was feverish and flushed, and he was crying. She took the infant's temperature and recorded it as 101 degrees Fahrenheit. She called Dr. Rohatgi and told him about the fever and he prescribed Tylenol. Even with the medication, the fever lasted about nine hours (R. 943, 945).

After the second vaccination on October 14, the infant manifested a fever of 102, 103 degrees Fahrenheit. Mrs. Monaco again called Rohatgi who again prescribed Tylenol (R. 953, 954). Additionally, the infant's right eye turned inward (R. 954).

After the third injection, the infant developed a high fever for about three days. The site of the injection was swollen and bleeding for which Dr. Rohatgi ordered an ice pack. Mrs. Monaco called Rohatgi every day from November 14 until the next visit on December 2, regarding the infant's condition (R. 958, 959).

Mrs. Monaco, the infant's mother, also told Dr. Rohatgi that the eye turned inward after the second, and before the third vaccination (R. 1111, 1112).

Before the defendant tampered with the testimony of Dr. Sherman, the latter testified that the first obstetrical danger sign occurred when Mrs. Monaco entered the hospital and the baby's head was not engaged in the pelvis. Under normal circumstances, the infant's head should have descended into the pelvis by the time Mrs. Monaco entered the hospital. This was probably due to the fact that the infant's head was facing the wrong direction (R. 1133), which should alert the attending physician to a high chance of cephalopelvic disproportion (R. 1134).

Dr. Sherman also testified that it was a departure from accepted practice for Dr. Ira Rubenstein to perform an amniotomy at 7:00 a.m., because the fetal vertex had not engaged in the pelvis (R. 1135). This allows the umbilical cord to prolapse and become compressed, which reduced the flow of oxygenated blood to the fetus and produces ischemia and fetal distress. The cardinal signs of fetal distress are a sudden abrupt drop of the fetal heart rate, as occurred in this case from 160 to 124 beats per minute a half hour later, and/or meconium staining, which was noted several times (R. 1135, 1137).

Fetal distress is an indication of intrauterine fetal hypoxia and ischemia and is an indication for immediate termination of pregnancy (R. 1139).

Dr. Sherman also testified that it was a departure from accepted practice to fail to do a Cesarean section to deliver

the infant at 7:00 a.m., or as soon thereafter as possible (R. 1141). He also testified that it was a departure from accepted practice not to use a fetal monitor to obtain continuous readings of the fetal heart beat, which would reveal significant changes in the baby's condition (R. 1143).

After Dr. Feiner and his attorney tampered with Dr. Sherman's testimony, Dr. Sherman repeatedly qualified his testimony and diluted the effect of it by stating that he was not speaking for the "standards of the other physicians at University Hospital" (R. 1326, 1335, 1336). Attorney Ryan repeatedly sought these responses by asking what Dr. Sherman "learned about the practices of other doctors" at University Hospital and what the practice was of the Director of Obstetrics at University Hospital (R. 1326, 1327, 1377, 1378). The Court, over objection, allowed Dr. Sherman to answer questions about the practice of the Director of Obstetrics (R. 1328). He said that failure to perform a Cesarean section after 7:20 or 7:30 did not cause the fetal distress. He stated that, in his opinion, it had already occurred. He also agreed with counsel on cross-examination that the failure to use a fetal monitor did not cause the distress which he says had already occurred and that there was no evidence of fetal distress at the time of delivery. There were other modifications of his testimony following the defendants' obviously successful efforts to modify what he had testified to.

Dr. Green, a pediatrician, testified that the third full dose of DPT vaccine should not have been given, or, alternatively, that the pertussis vaccine should have been omitted from the vaccination (R. 1479).

Dr. Green further testified that the infant had a reaction to the pertussis vaccine which caused convulsions and blindness (R. 1489), and that the blindness was not congenital (R. 1580, 1581, 1584).

The main risk of DPT vaccine in 1974 was encephalitis (an inflammation of the brain) due to the whooping cough (pertussis) element of the vaccine. A reasonably prudent person would have advised the patient of these risks (R. 1497, 1498).

Dr. Shapiro, a neurologist, testified that the infant's seizures were due to hypoxia suffered before the delivery and encephalitis from the DPT vaccinations (R. 1620). There was fetal distress as shown by meconium-stained fluid (R. 1640). Furthermore, the fetal distress occurred from the time the membranes were ruptured when the amniotomy was performed, to the time of delivery (R. 1656).

APPENDIX B.

Order of Appellate Division—Second Department, Dated March 29, 1982.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 29, 1982.

Hon. Lawrence J. Bracken, Justice Presiding,
Hon. Richard A. Brown,
Hon. James F. Niehoff,
Hon. Isaac Rubin,
Associate Justices.

FRANK ANGELO MONACO, etc., *et al.*,

Appellants,

v.

FREDERICK S. FEINER *et al.*,

Respondents;

et al.,

Defendants.

In the above entitled cause, the above named Frank Angelo Monaco, etc., *et al.*, plaintiffs, having appealed to this court from a judgment of the Supreme Court, Orange County, entered July 23, 1979; and the said appeal having been argued by Michael M. Platzman, Esq., of counsel for the appellants, argued by Lawrence T. D'Aloise, Jr., Esq., of counsel for the respondents Frederick E. Feiner, Alan L. Rubenstein, Ira S. Rubenstein and Fred S. Levinson, Individually and as Co-partners, and Middletown OBS-GYN Associates, P. C., argued by Bruce G. Habian, Esq., of counsel for the respondent Rohatgi and argued by Michael A. Hayes, Jr., Esq., of counsel for the respondent Elizabeth A. Horton Memorial Hospital, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgment appealed from is hereby unanimously affirmed, without costs or disbursements.

Enter:

IRVING N. SELKIN

APPENDIX C.

Order of the New York State Court of Appeals, Dated October 19, 1982.

COURT OF APPEALS,

STATE OF NEW YORK.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of October A. D. 1982.

Present, Hon. Lawrence H. Cooke, Chief Judge, presiding.

2 Mo. No. 800

FRANK ANGELO MONACO, an infant &c., *et al.*,

Appellants,

vs.

FREDERICK S. FEINER & ors., individually and as copartners in the firm of "John Doe," a partnership, *et al.*,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

JOSEPH W. BELLACOSA
Clerk of the Court